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## **A S I F D I V O R C E W A S Y O U R B I G G E S T P R O B L E M :**

### **W H A T H A P P E N S W H E N S O M E O N E D I E S I N T H E M I D D L E O F A D I V O R C E P R O C E E D I N G ?**

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#### **A. Estate planning changes during divorce – what can and can’t you do?**

1. Automatic Temporary Restraining Orders (“ATROs”): Under Cal. Fam. Code §2040(a), four standard mutual restraining orders attach automatically upon filing for divorce, legal separation or nullity.<sup>1</sup>

a. When do the ATROs apply?

(i) To Petitioner: Upon filing and issuance of summons (included in the family law summons FL-110). (ii) To Respondent: Upon service.

2. Prohibited Actions under ATROs:

a. FC §2040(a)(2): restraining parties from “transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community or separate, without the written consent of the other party or an order of the court.”

b. FC §2040(a)(3): restraining parties from “cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability held for the benefit of the parties and their child or children for whom support may be ordered.”

b. FC §2040(a)(4): restraining parties from “creating a nonprobate transfer or modifying a nonprobate transfer in a manner that

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<sup>1</sup> For purposes of this presentation we are focusing on those restraints imposed by Fam. Code §2040(a)(2), (3) and (4).

affects the disposition of property subject to the transfer,” without written consent of the other party or court order.

i. “Nonprobate transfer”: a written instrument, excluding a will, transferring property on death.

ii. Restraints on revocable trusts, pay on death accounts, revocable transfer on death deed (TOD), *marital property agreements*, and other instruments under Cal. Prob. Code §5000.

3. Permitted Actions. ATROs do not apply to:

a. All actions subject to written consent and/or court order, *except* actions under FC §2040(a)(3) related to insurance policy coverage.

b. Modifying a nonprobate transfer that does not affect “the disposition of property subject to the transfer.” FC §2040(a)(4).

i. Naming a new trustee or successor trustee (so long as not to affect trustee’s powers related to disposition of trust property).

ii. Changing a beneficiary or modifying terms of power of appointment are prohibited.

c. Creating, modifying, or revoking a will. FC §2040(b)(1).

d. Revoking nonprobate transfers, but *only if* notice of the change is filed and served on the other party prior to the change taking effect. FC §2040(b)(2).

e. Eliminating right of survivorship (e.g. severing joint tenancies or survivorship rights to community property), but *only if* notice of the change is filed and served on the other party prior to the change taking effect.

f. Creating unfunded revocable or irrevocable trusts. FC §2040(b)(4).

g. Disclaiming a beneficial interest: parties may execute and file a disclaimer pursuant to PC §260.

4. ATROs: Effects and Penalties

a. Under FC §234, the ATROs are not presumptively competent evidence nor are they court orders. They are meant to preemptively enjoin certain conduct, but not necessarily stop conduct already occurring.

b. Under FC §235, the ATROs may be expanded and/or superseded by other statutes or interim orders.

c. Under FC §233(a), the ATROs are in effect until *final judgment or dismissal*. Query: does abatement of a divorce proceeding due to death amount to a dismissal absent further court order?

d. Under FC §233(c), a “willful and knowing violation” of these ATROs is punishable pursuant to Cal. Penal Code §273.6. Violation under §273.6 would be a misdemeanor punishable by fine of no more than \$1,000, imprisonment in jail for no more than one year, or both.

i. However, Penal Code §273.6 does not specifically apply to ATROs under its own terms, leaving contempt, but not criminal prosecution, as a remedy for violations. In terms of actions under FC, Penal Code seems only to apply to domestic violence statutes.

ii. Case Study: Client’s deceased spouse removed client as beneficiary of life insurance policy maintained for the benefit of client and parties’ children, during divorce proceeding. Post-judgment, and after decedent died, we found out about the change. What do to? Successful argument was that the aggrieved spouse (client) was entitled to restitution in the amount that would have been realized had the asset been available at the finalization of dissolution – relying on a remedy similar to FC §1101(g) remedy for breach of spouse’s fiduciary duties. Also, successful argument that a constructive trust may be imposed against the estate under Cal. Civ. Code §2224; *Cramer v. Biddison* (1968) 257 Cal.App.2d 720, 724.

## **B. Jurisdictional Issues: family or probate court?**

1. General Rule: judgments, orders and proceedings held in any single department of a superior court are effective in all departments. Cal. Const. Art. VI, §4.

a. There is only ONE superior court in each county, and the first department to properly exercise jurisdiction has exclusive jurisdiction until the matter is finally disposed of; and orders and judgments made by that department are binding on all departments unless overturned on appeal. *Williams v. Sup. Ct.* (1939) 14 Cal.2d 656, 658-662.

b. As long as a dissolution proceeding is pending in family court, no other superior court may interfere with the family court’s exercise of powers. *Dale v. Dale* (1998) 66 Cal.App.4th 1172.

i. *Exception:* If both parties die *after* a marital dissolution status judgment, a personal representative of either party’s estate may bring a petition in probate court to establish ownership of marital property, even if

the family court has reserved jurisdiction. PC §850; *Estate of Layton* (1996) Cal.App.4th 1337, 1339.

ii. Concurrent jurisdiction in child support matters: if a deceased parent included all of their assets in trust, there is no probate estate, a child support obligation is enforceable against the trust. The family court thus has concurrent jurisdiction with the probate court to join a trustee to a divorce proceeding and order support payments from a trust. *Marriage of Perry* (1997) 58 Cal.App.4th 1104, 1111.

2. When a spouse dies during the pendency of a marital dissolution action and before the marriage is terminated, the death of the spouse terminates the marriage under FC §310(a).

3. Prior to status termination:

a. The 6-month rule: FC §2339(a) – spouses cannot finalize their divorce until 6 months after the date of service or the respondent's first appearance in the action, whichever is first.

b. The family court's jurisdiction *abates* when a party dies prior to termination of marital status, meaning, family court is divested of all further jurisdiction with respect to *status* and *unadjudicated* issues addressed in the pleadings including:

- c. property rights;
- d. support;
- e. custody;
- f. attorney fees.

g. *Marriage of Shayman* (1973) 35 Cal.App.3d 648, 651; *Estate of Blair* (1988) 199 Cal.App.3d 161, 166-167 (holding that family court's jurisdiction to divide joint tenancy between spouses was abated by spouse's intervening death before marital status terminated by judgment).

4. After status termination: The family court's subject matter jurisdiction is *not* affected by one spouse's death *after* status is terminated with a judgment that also reserves jurisdiction to decide remaining issues (i.e. a bifurcated "status only" judgment under FC §2337(f)).

a. Decedent's personal representative, or if none, decedent's successor in interest substitutes into the pending family court proceeding, and the issues are decided under the Family Code by filing an affidavit (CCP §§377.31, 377.32, 377.41).

i. “Successor in interest” defined: “the beneficiary of the decedent’s estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.” CCP §377.11.

ii. *Marriage of Hilke* (1992) 4 Cal.4th 215: party’s death after bifurcated dissolution judgment did not abate family court’s ability to decide reserved property division issues.

iii. *Marriage of Drake* (1997) 53 Cal.App.4th 1139: family court’s jurisdiction to hear party’s postjudgment request for child support modification continued after her death through her executors and trustees.

b. Family court has continuing jurisdiction even if issues “under submission” but pre-decision. *Marriage of Mallory* (1997) 55 Cal.App.4th 1165, 1167.

i. “Under submission” = the earlier of (1) the date the court orders the matter submitted, or (2) the date the final paper is required to be filed or argument is heard. Cal. Rule of Court 2.900(a).

ii. Court’s power to act is statutory under CCP §669 and inherent under *Fox v. Hale & Norcross Silver Mining Co.* (1895) 108 Cal. 478, 482-483.

iii. Family court has continuing jurisdiction to enter a judgment *nunc pro tunc* to date before a party’s death if the party died between the court’s oral judgment and written judgment. *Frederick v. Sup. Ct. (Martin)* (2014) 223 Cal.App.4th 988, 990.

c. Family court has continuing jurisdiction over post-judgment child support actions. Reasoning: a statutory obligation to support a child runs to the *child*, not the other party; and therefore, the representative (or successor in interest) of a party who died after filing a request for post-judgment child support modification may continue the request in family court. *Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1151-1152.

d. Nullity proceedings: a pending proceeding for annulment survives a party’s death in family court, even if there is no judgment. Reasoning: the purpose of a nullity action is to determine whether a valid marriage ever existed, as opposed to terminating marital status. *Marriage of Goldberg* (1994) 22 Cal.App.4th 265, 271.

5. Why does it matter which department has jurisdiction?

a. Inheritance rights in joint tenancy property: Under FC §2581, joint tenancies are presumed to be community property subject to

division in divorce. So, if one party dies after bifurcation, and the court retains jurisdiction, the surviving joint tenant spouse will not automatically inherit the property by operation of law. *Marriage of Hilke* (1992) 4 Cal.4th 215; but *see also In re Estate of Layton* (1996) 44 Cal.App.4th 1337 whereunder it was determined that keeping joint tenancy for 10 years after bifurcation was proof that parties intend to maintain survivorship rights. Under this presumption, the deceased spouse's share in family court will be passed according to the will or by intestate succession.

i. Notice of intent to sever joint tenancy: if marital status has not been terminated, and one party wants to unilaterally sever joint tenancies. FC 2040(b)(3).

b. FC §2640 applies in divorce proceedings for the “division of the community estate....” This code section was enacted in response to *In re Marriage of Lucas* (1980) 27 Cal.3d 808, which held that the community property presumption of title trumped separate property tracing. *Lucas* appears to still be good case law for proceedings under the Probate Code.

6. Post-Judgment Issues: The family court's jurisdiction to hear matters *after* entry of a final dissolution judgment is limited (FC §2556):

a. Child support, child custody, spousal support (for discussion) *In re Marriage of Armato* (2001) 88 Cal.App.4th 1030, 1040;

b. Judgment contains reservation of jurisdiction;

i. Family court's ability to reserve jurisdiction is limited “over the particular issue until such time as the rights of such person and the parties to the proceeding under the Family Code have been determined in a separate action or proceeding. CRC 5.18(b).

ii. The family court may not “rewrite” an agreement of the parties by reserving jurisdiction, however. Most cases of reservation of jurisdiction deal with a retirement plan that a court could not divide at the time of judgment. *In re Marriage of Melton* (1994) 28 Cal.App.4th 931, 938.

c. Community assets/liabilities that were unadjudicated by the judgment, typically when a previously undisclosed or unknown asset is discovered after judgment is entered. FC §2556;

d. Equitable relief for a judgment based on mistake or fraud.

i. Weighing the policy of reaching a final resolution through judgment with the policy of providing a fair adversary proceeding. *Estate of Sanders* (1985) Cal.App.3d 607, 614.

ii. Courts are more likely to grant relief from judgment when there has been a violation of the special, fiduciary relationship between spouses – e.g. knowingly concealing an asset. Courts will examine the facts in light of (i) recognizing that a party who failed to assemble evidence should not be able to relitigate, and (ii) parties should be able to receive relief if not given a fair opportunity to litigate in the first place. *Estate of Beard* (1999) 71 Cal.App.4th 753, 774.

## 7. Enforcing Family Law Judgment

a. Under FC §290, enforcement of a judgment for possession or sale of property, or for child, family or spousal support, is accomplished through the “Enforcement of Judgments Law” (“EJL”). FC §290; CCP §699.510(b).

b. However, “[a]fter the death of a judgment debtor, enforcement of a judgment against property in the judgment debtor’s estate is governed by the Probate Code, and not by this title.” CCP §686.020.

c. PC §9300, et seq.: the enforcement of a judgment against a decedent’s estate must be made in Probate Court.

i. For money judgments (e.g. support payments): the judgment will be enforced and paid only in the ordinary course of an estate’s administration.

ii. For possession or sale of property judgments: the judgment will be enforced by writ of possession or sale issued by the court. CCP §§715.010, 716.010.

d. *Estate of Bonzi* (2013) 216 Cal.App.4th 1085: family court had to yield to the Probate Court to enforce the family court’s orders. When a probate court’s jurisdiction attaches, enforcement of family law judgments most usually will occur in probate court.

## C. Support Rights Upon Death

### 1. Spousal Support

a. General Rule: liability for support of a spouse terminates upon the death of the obligated spouse. FC §4337.

b. FC §4360: when “just and reasonable in view of the circumstances of the parties,” in a spousal support order, the court *has discretion* to order that an annuity, life insurance policy, or trust be maintained for a supported spouse. The purpose is to ensure a truly needy spouse has care after regular support terminates.

c. However, the parties may by an agreement, provide that the liability for support may continue during the lifetime of the surviving spouse and, by an agreement, may extend beyond the death of the obligated spouse. “The provisions of the agreement may be incorporated in an interlocutory decree of divorce and liability for such support, either upon the judgment or the agreement or both, is a proper basis for a claim against the estate of the decedent.” *Pelser v. Pelser* (1960) 177 Cal.App.2d 228, 230.

d. A party entitled to spousal support under a dissolution judgment would be required to file a creditor’s claim against the decedent’s estate within the applicable time requirements – *one year after the decedent’s death*. CCP §366.3; *Embree v. Embree* (2004) 125 Cal.App.4th 487, 494.

## 2. Child Support

a. General Rule: liability of a parent to support a minor child which is pursuant to court order or agreed upon by the parties, does not cease at time of the parent’s death, but survives as a charge against the parent’s estate. *Taylor v. George* (1949) 34 Cal.2d 552, 556.

b. *Newman v. Burwell* (1932) 216 Cal. 608, the court held that the father’s payment of a specified sum for child support ordered by the court was an obligation that continued after the father’s death and during the minority of his children. The court further noted, “it is the solemn duty of every father to support his children during their minority, and if he fails to do so, every principle of justice demands that they be thus supported out of his estate.” *Id.* at 612-613.

c. Arrears: support not yet accrued is subject to modification upon a showing of changed circumstances; but an obligor’s estate is liable for amounts in arrears. *Marriage of Bertrand* (1995) 33 Cal.App.4th 437, 441.

d. Trust property: child support is also chargeable against a trust, which is subject to the obligor’s power of revocation. It does not matter if there is no probate estate. *Marriage of Perry* (1997) 58 Cal.App.4th 1104, 1009: “....there is no difference in substance between an estate which might be properly charged with the child support obligation and property held in a living trust.”

e. Remarriage of Decedent Spouse: even the community property acquired during a decedent obligor’s second marriage is liable for child support obligations. PC §§13550, 13551, 13553.

i. However, surviving second spouse is only personally liable to extent they did not submit the entire community property estate to

probate, and if they had, then only to the extent of the net value of community property of the estate at date of death not exempt from enforcement of a money judgment. *See also Marriage of D'Antoni* (1981) 125 Cal.App.3d 747, 747-750. So, the community is liable if the estate was NOT submitted to probate, or if it was, then only if it is NOT exempt from a money judgment.

f. Child Support Increase? It is uncertain whether an estate can be liable for a post-death request for increase in child support that is not already part of an existing child support order. *Marriage of Perry* 58 Cal.App.4th 1104, 1110. We spoke about this case before, where the court ruled that a trust could be liable for child support, but the court did not decide whether post-death increases could be awarded.

g. Custodial Parent's Death: Even if an obligor parent assumes custody of a child after the custodial obligee parent's death, a child support obligation survives, but it may form the basis for a request for modification or termination. *Marriage of McCann* (1994) 27 Cal.App.4th 102, 104.

**D. Types of agreements – settlement contract or part of a court order? Does it matter?**

1. Settlement contract?

“The provisions of [an] agreement may be incorporated in an interlocutory decree of divorce and liability for such support, either upon the judgment or the agreement or both, is a proper basis for a claim against the estate of the decedent.” *Pelser v. Pelser* (1960) 177 Cal.App.2d 228, 230.

2. Court order?

In California, a party entitled to spousal support under a dissolution judgment would be required to file a creditor's claim against the decedent's estate within the applicable time requirements. *Embree v. Embree* (2004) 125 Cal.App.4th 487, 494.

3. Does it matter?

A merged separation agreement is superseded by the marital settlement decree and the obligations imposed are that of the marital settlement decree and enforceable as such. Once the contract is merged into the decree, the merger replaces the obligations of the contract with those of the decree and the merger extinguishes the contract's obligations. *Estate of Gibson* (1990) 219 Cal.App.3d 1486.

**E. Can surviving spouse enforce a marital settlement agreement?**

1. How and what can the deceased spouse's estate enforce a marital settlement agreement?

a. In *Estate of Gibson* (1990) 219 Cal.App.3d 1486, a husband and wife obtained a judgment of dissolution and their marital property settlement agreement which included a waiver of each spouse's right to the other's estate. This was approved and merged into part of the judgment of dissolution. However, the parties stipulated to set aside the marital status termination date, but all other provisions of the judgement would remain intact and in effect. At the time of the husband's death, the marriage had not been terminated and the husband's son and wife were competing for the decedent's estate.

b. The court in *Estate of Gibson* found that once a waiver agreement merges into a judgment, this becomes a final judicial determination of the rights of the parties. Thus, enforceability of the final judgement has already been determined and achieved. A dissatisfied party may seek relief from a judgment incorporating a waiver of rights by claiming mistake, inadvertence under California Code of Civil Procedure Section 473, or assert, by motion, extrinsic fraud or appeal the dissolution judgment. Here, the court ruled in favor of the decedent's son stating that a finding of invalidity of the waiver would have the potential of affecting the validity of the entire decree and therefore, the judgment in the marital dissolution case was binding and the waiver contained in the marital agreement was valid. *Estate of Gibson* (1990) 219 Cal.App.3d 1486, 1494.

2. How does the surviving spouse enforce a marital settlement agreement when the spouse or ex-spouse predeceases them before performance occurs?

a. In *Pelser v. Pelser* (1960) 177 Cal.App.2d 228, the husband and wife obtained an interlocutory divorce in 1950. The wife was awarded alimony until her death or remarriage and the husband was ordered to pay child support until the children became of age, self-supported or married. A final decree of divorce was entered in 1951. In 1957, the wife filed an action to collect the amount owed to her when her husband's payments became in arrears. However, the husband died and the wife was allowed to substitute as administratrix of her husband's estate. The court found that although a final judgment for divorce had been entered long before the death of the decedent, the court found that the plaintiff and surviving spouse did not file a claim against the estate of the decedent. Probate Code Section 732 expressly states that a judgement against the decedent for the recovery of money must be filed or presented in the same manner against the estate as other claims. Due to the absence of the claim against the decedent's estate, the action could not be maintained.

b. Therefore, a surviving spouse may enforce a marital settlement agreement by filing a claim, in the same manner as any other claim, against the decedent's estate within the time requirements.

c. In sum, marital settlement agreements merged into an interlocutory judgement become part of a judgment and enforceable as a judgement and marital settlement agreement not merged into judgment and is rather an enforceable contract. *Flynn v. Flynn* (1954) 42 Cal.2d 55, 58; *In re Marriage of Lane* (1985) 165 Cal.App.3d 1143, 1147.

**F. Decedent's debts and community property – what is the survivor's liability?**

1. Surviving spouse's liability to decedent's debts and community property.

a. Probate Code Section 13551 limits a surviving spouse's personal liability to the fair market value, on the date of the decedent's death, of the surviving and decedent spouse's share of community and quasi-community property, as well as separate property of the decedent spouse. (*Kircher v. Kircher* (2010) 189 Cal.App.4th 1105, 1113.)

b. For all purposes connected with administration of community property, debts of the community are not private, individual debts of the surviving spouse, but as debts of both spouses. *Packard v. Arellanes* (1861) 17 Cal. 525. Therefore, a surviving spouse is liable for the decedent's debts and the surviving spouse's half of community property is subject to liability for debts and expenses of the decedent's estate.

c. Further, under Probate Code §13554, any debt described in §13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died but Code of Civil Procedure §366.2, establishing a 1 year state of limitation still applies to actions. For this reason, in order to toll the statute of limitation a creditor's claim must be filed in a timely fashion. If a probate exists, within 4 months after Letters are issued or 60 days after Notice to Creditors is provided to the known creditors.